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IN THE

Supreme Court of the United States

October Term, 1962
No. 686

RALPH R. BENSON,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINION BELOW.

The Opinion of the District Court of Appeal, Second Appellate District, Division One, is reported as *People v. Benson*, 200 A. C. A. 608, and 23 Cal. Rptr. 908. The Opinion is also set forth as the Appendix to the Petition.

JURISDICTION.

The petitioner seeks to invoke the jurisdiction of this Honorable Court pursuant to 28 U. S. C. Section 1257(3).

QUESTIONS PRESENTED.

The Petitioner contends that:

1. He was denied due process when the California Court held that he had no standing in the state court to rely on the defense of entrapment because he did not admit the commission of the crime.

2. He was denied due process because, he contends, the District Court erroneously stated that he conceded that a *prima facie* case of conspiracy existed.

3. He was denied due process and equal protection when, it is asserted, the state court construed a phrase in a state criminal statute contrary to the construction of the same phrase in prior civil cases, and

4. He was denied certain rights when state agents obtained entry into his office by misrepresentations and a recording of his conversations with the agents was obtained and testimony as to the conversations received at the trial over objection.

STATEMENT OF THE CASE AND OF FACTS.

In order not to further encumber the records of this Court, the People will rely upon the Statement of the Case and Statement of Facts set forth in the Respondent's Brief which was filed in the District Court of Appeal of the State of California and which has been transmitted to this Court. This summary appears on pages 1-44 of the Respondent's Brief.

ARGUMENT.

I.

There Was No Violation of Due Process.

Petitioner urges a violation of due process of law under the Federal Constitution in four separate instances. Respondent submits that none of the instances raised comes with the concept of due process as established by this Honorable Court. Due process has frequently been described as that which violates:

> "'the very essence of a scheme of ordered liberty' and its continuance would 'violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."'" (*Bute v. Illinois* (1948), 333 U. S. 640, 659, 92 L. Ed. 986, 997, and cases cited therein.)

Relative to the Due Process Clause as it applies to State criminal procedure, this court has stated:

> "But the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. . . . Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures. . . ." (*Carter v. Illinois* (1946), 329 U. S. 173, 175, 91 L. ed 172, 175.)

Whether or not there has been a violation of due process depends upon a consideration of all of the circumstances involved in the particular case. Thus, in

Crooker v. California (1958), 357 U. S. 433, 2 L. ed. 2d 1448, 1453, 78 S. Ct. 1287:

> "It [the possibility of a violation of due process] is negated here by petitioner's age, intelligence, and education. While in law school he had studied criminal law; indeed, when asked to take the lie detector test, he informed the operator that the result of such a test would not be admissible at trial absent a stipulating by the parties. . . ."

In this matter, the petition alleges "The petitioner, Ralph R. Benson, is an attorney at law admitted into practice in 1947." (Pet. p. 4.) In its opinion, the District Court of Appeal made the following comment regarding the status of petitioner:

> "A scrupulous concern for his duties as an attorney would have dictated that appellant not thus stand aside and let others determine where the truth lay; certainly appellant's position, thus revealed seems out of harmony with his statutory duty, 'To employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth. . . .' (Bus. & Prof. Code, Sec. 6068(d)). Situations will arise where there is an *honest* difference of opinion, but this is not such a case." (Appx. to Pet. p. 16.)

We now discuss, in the order set forth in the Petition, each of the four instances urged as a violation of due process.

II.

No Federal Question Is Raised With Respect to the Defense of Entrapment.

A. Introduction.

Petitioner's claim of entrapment has no semblance of merit whatsoever in light of the fact that petitioner's entire defense in the trial court was based upon his claim that he submitted the false claims of insurance without any knowledge of their falsity. Thus, there was no evidence whatsoever that petitioner was entrapped into doing an act with an evil intent because petitioner claimed he never had any evil intent. By petitioner's own story, the police in no way whatsoever induced him into committing a crime.

Furthermore, petitioner makes certain assertions with respect to the manner in which he was induced to represent the purported victims of automobile accidents which at least are misleading. The petition at page 18 states as follows:

> "Petitioner did not solicit either agent to enter his office or become his client. Instead each of the agents telephoned petitioner requesting representation in their prosecution of personal injury claims."

In fact it appears that in neither instance did either Buchholz or Meng (the alleged victims) solicit petitioner. Instead, in the case of Buchholz, Buchholz was contacted by Matloff, a co-defendant of petitioner

whom Buchholz had never previously met. Buchholz was told that Benson would be the attorney handling the case and was later contacted by a representative of Benson's office. In the case of Meng, Matloff called petitioner who then talked to Meng. See the opinion of the District Court of Appeal which is attached to the petition as Appendix A at page 2 and which sets forth the true manner in which Benson came to represent Buchholz and Meng.

B. The Defense of Entrapment Is Not a Constitutionally Protected Defense.

It appears that the defense of entrapment is an American innovation unknown at common law in England and is a defense which came into being in the late 19th century, long after the adoption of the Federal Constitution. See William E. Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. L. R. 245-247. The principles of entrapment were created by the courts of the various states and the Federal courts not because of any constitutional compulsion, but rather as a judicial or statutory principle which those courts believed should be applicable in the trial of criminal cases.[1] Thus, this Court accepted the doctrine of entrapment as a state of facts which either the legislature had not intended to cover (see majority opinion

[1]However, Tennessee has rejected entrapment as a defense. *Roden v. State* (1961), 352 S. W. 2d 227. But see *Hajemaker v. State* (1961), 347 S. W. 2d 488, which is distinguished in *Roden v. State*.

in *Sorrells v. United States* (1932), 287 U. S. 435) for which the courts, in order to protect the purity of government and its processes, would not permit to be used as the basis for a conviction (see concurring opinion in *Sorrells v. United States, ibid* at 453). Neither the majority nor the concurring opinion in the *Sorrells* case premise their analysis on a constitutional basis.

The reasons why California adopted this doctrine are set forth as follows in *People v. Benford*, (1959), 53 Cal. 2d 1, 8-9:

> "In California recognition of the defense is said to rest upon the broadly stated ground of 'sound public policy' and 'good morals.' (*People v. Makowsky* (1935), 3 Cal. 2d 306, 309 [4] [44 P. 2d 536]; *People v. Gallagher* (1930), 107 Cal. App. 425, 529 [290 P. 504]; In re Moore (1924), 70 Cal. App. 483, 487 [6] [233 P. 805]; *People v. Barkdoll* (1918), 36 Cal. App. 25, 28 [171 P. 440].) The precise nature of this public policy has not been spelled out in any California majority opinion concerning entrapment, but obviously California has recognized the defense for reasons substantially similar to those which caused this court, in *People v. Cahan* (1955), 44 Cal. 2d 434, 445-446 [7] [282 P. 2d 905, 50 A.L.R. 2d 513], to adopt the rule that evidence obtained in violation of constitutional guaranties is not admissible; i.e. out of regard for its own dignity; and in the exercise of its power and the performance of its duty to formulate and apply proper standards for judi-

cial enforcement of the criminal law, the court refuses to enable officers of the law to consummate illegal or unjust schemes designed to foster rather than prevent and detect crime. (See the concurring opinion of Justice Frankfurter in *Sherman v. United States* (1958), supra, 356 U. S. 369, 380; the minority opinion of Justice Roberts in *Sorrells v. United States* (1932), 287 U. S. 435, 454-455 [53 S. Ct. 210, 77 L. Ed. 413, 86 A.L.R. 249] [quoted with approval in the opinions of Presiding Justice Shinn adopted as dissents in *People v. Braddock* (1953), 41 Cal. 2d 794, 803 [264 P. 2d 521], and *People v. Terry* (1955), 44 Cal. 2d 371, 377 [282 P. 2d 19]]; and the dissenting opinion of Justice Brandeis in *Casey v. United States* (1928), 276 U. S. 413, 423 [48 S. Ct. 373, 72 L. Ed. 632].) Although there is an instinctive sympathy for the originally well-intended defendant who is seduced into crime by persuasion and artifice, such a defendant is just as guilty where his seducer is a police officer as he would be if he were persuaded by a hardened criminal accomplice. Entrapment is a defense not because the defendant is innocent but because, as stated by Justice Holmes (dissenting in *Olmstead v. United States* (1928), 277 U. S. 438, 470 [48 S. Ct. 564, 72 L. Ed. 944, 66 A.L.R. 376], an illegally obtained evidence case), 'it [is] a less evil that some criminals should escape than that the Government should play an ignoble part.' (Frankfurter, J., concurring in *Sherman v. United States* (1958), *supra* p. 380 of 356 U.S.)."

C. The Rule That a Defendant Who Denies That the Act Charged as a Crime Was Not Committed Cannot Rely Upon the Defense of Entrapment Does Not Violate Due Process.

An annotation appearing in 61 A. L. R. 2d 677 contains a multitude of Federal and State cases which stand for the proposition that the defense of entrapment is not available to a defendant who denies that the act charged as a public offense was not committed, and some which hold that the defense is not available to one who denies that he committed the offense charged.

Petitioner states that in *Hansford v. United States* (1962), 303 F. 2d 219 it was decided "that federal due process required that the court give the accused standing to raise the defense of illegal entrapment although the accused denied the commission of the offense charged." (Pet. p. 11.) That case did not so decide, nor have we been able to find any authority for such a proposition.

D. Even if It Were a Denial of Due Process to Refuse the Defense of Entrapment Where a Defendant Denies That the Act Charged as a Crime Was Committed, the District Court of Appeal Held That the Facts of This Case Do Not Support the Defense of Entrapment.

It should be noted that the District Court of Appeal stated as follows with respect to the defense of entrapment:

> "Under the circumstances, we need not discuss the additional claims (*although neither is tenable*) that appellant was *in fact* entrapped or that the evidence establishes entrapment as a matter of law." (See Appx. to Pet. p. 18; emphasis added to language appearing in parentheses.)

It is thus clear from this sentence that the District Court of Appeal, in addition to holding that the defense could not be relied upon by petitioner, also concluded that it was not tenable because the facts did not support reliance upon this defense. A detailed discussion of this aspect of the case appears at pages 60-63 of the Respondent's Brief which was filed with the District Court of Appeal and has been transmitted to this Court.

E. The Record Does Not Disclose That the Trial Court Refused to Consider the Defense of Entrapment.

It should be noted that in presenting the record on appeal to the District Court of Appeal, the petitioner did not include the argument of either counsel to the trial court after the conclusion of this court trial. [See the Clerk's Transcript, page 24 which discloses that on December 29, 1960, arguments were presented to the trial court by both counsel and note that the Reporter's Transcript which petitioner presented to the District Court of Appeal does not contain those arguments or any comments the trial court may have made thereon.] It is thus clear that the petitioner failed to present a proper record to the District Court of Appeal and to this Court for determination of the issue whether or not the trial court denied him use of the defense of entrapment. The trial court may have permitted the use of this defense and then simply rejected it.

Although the petition alleges "this issue was raised throughout trial and on the motion for a new trial." (Pet. p. 7) the only reference given by petitioner to the record is "C.T. Pages 28-36." Those pages of the Clerk's Transcript contain petitioner's brief in support

of this motion for a new trial and it should be noted that the pages referred to by petitioner merely relate to the conspiracy count and nowhere refer to or use the word "entrapment." If petitioner had been denied the defense of entrapment, it would have been a denial as to all three counts. Yet the portion of the brief to which petitioner refers this court merely relates to the conspiracy count. Furthermore, a close reading of that portion of the brief discloses that it does not relate to entrapment even on that count.

Even assuming that the District Court of Appeal was in error in holding that the defense of entrapment cannot be relied upon if the defendant denies the crime, it cannot be assumed by this Court that the trial court made a similar error since the trial court may have reasoned that the facts would not support the defense of entrapment even if it could be relied upon. Petitioner by failing to bring to this court whatever comments the trial court may have had at the time it found petitioner guilty has failed to show that the trial court erred.

The petitioner states, "The law of California, stated in *People v. Wilburn*, 49 Cal. 2d 714, 321 P. 2d 452 presumes that the trial court applied the law pronounced by the appellate court at the trial of appellant's case." (Pet. p. 10.) Wilburn discusses the sufficiency of evidence to sustain a murder conviction, harmless misconduct by a prosecutor, the defense of insanity, and the presumption that a court gave adequate consideration to a motion by defendant. It does not discuss the proposition of petitioner quoted above. We therefore submit that *Wilburn* is not in point.

III.

The District Court of Appeal Did Not Rely Upon an Unwarranted Concession nor Even if Such Reliance Did Exist, Would There Be Denial of Due Process.

Here again it must be noted that even assuming the District Court of Appeal based its affirmance upon an erroneous concession, it cannot be assumed that the trial court similarly erred. The question before the trial court as well as before the District Court of Appeal with respect to the issue of conspiracy was whether or not the petitioner had knowledge of the conspiracy. This was the crucial and only issue which petitioner in his appeal and in the trial court raised with regard to the issue of conspiracy. This issue was decided adversely to petitioner by the trial court and the District Court of Appeal meticulously set forth the evidence which supports the finding of the trial court that the petitioner had knowledge of the falsity of the claims which he submitted to the insurance company. (See pp. 14-16 of the opinion which is attached to the petition as an appendix.)

Petitioner states that the following sentence in the opinion of the District Court of Appeal erroneously states a concession that he did not make:

> "As noted earlier, appellant concedes that the existence of a conspiracy can be inferred if the evidence shows that he had the knowledge requisite to the commission of the substantive offenses; he also concedes, apparently not challenging the fact that a *prima facie* case was made out, that the declarations and statements made by his co-con-

spirators outside his presence would be admissible (*People v. Robinson*, 43 Cal. 2d 132, 137.)" (Appx. to Pet. p. 10.)

However, we believe that it is apparent from a reading of this sentence that what the District Court of Appeal meant was as follows: Petitioner expressly conceded that the existence of a conspiracy as to petitioner depended upon whether or not he had the knowledge required for grand theft and, for a violation of Section 550 of the Insurance Code; petitioner also implicitly conceded that if he had such knowledge, conversations made by his co-conspirators outside his presence would be admissible as to petitioner since petitioner did not challenge the fact that a *prima facie* case of conspiracy between the co-defendants had been established.

Petitioner at no time had argued that the evidence did not establish a *prima facie* case of conspiracy between petitioner's co-defendants who had entered a plea of guilty. Indeed petitioner's motion for a new trial in essence conceded that a conspiracy existed but argued that petitioner was not part of that conspiracy. [See Clk. Tr. p. 32, lines 19-23; p. 34, lines 20-29; p. 35, lines 1-39.]

The above interpretation of the District Court of Appeal's opinion is buttressed by the following quotation from Appellant's Closing Brief, page 35, which has been sent to this court as part of the record:

> "The controlling pertinent fact in this case was that Buchholz and Meng did not sustain personal injury in the respective accidents they reported.
>
> "The question whether a *prima facie* case is

made out against Appellant so as to allow the admission of acts and declarations of his alleged coconspirators into evidence, resolves itself down to the proposition as to whether there is substantial evidence to support a reasonable inference the Appellant knew this pertinent fact:

"There is no evidence in the record to support an inference Appellant had antecedent knowledge of the false practices of Dr. Matloff (see Villabisencio testimony, *Reporter's Transcript, page 509, lines 18 to 23*) or of Dr. Harder (see Jensen testimony, *Reporter's Transcript, page 605 to page 616*)."

IV.

The District Court of Appeal's Construction of Insurance Code Section 556 Is in Accordance With Prior Cases.

Petitioner states at page 16 of the Petition, "Because 'claims . . . under a contract of insurance' have never previously been considered to include tort claims, the application to petitioner of this statute denied him due process and equal protection of the law." However, petitioner has failed to disclose to this court the two prior cases in California which are referred to and relied upon in the opinion of the District Court of Appeal and which had interpreted Insurance Code Section 556 to apply to situations similar to those disclosed under the facts of this case. See *People v. Grossman*, 28 Cal. App. 2d 93 and *People v. Reed*, 190 Cal. App. 2d 344, both discussed in the opinion at pages 19-20 of the appendix to the petition.

V.

There Is No Violation of the Constitution When the People Use Undercover Agents to Catch Persons Engaged in Criminal Conduct.

The evidence which the People used with regard to Count III consisted of both recordings made on a miniphone when the District Attorney's investigator, Meng, went to petitioner's office, and evidence of tape recordings made by Meng at the time that he telephoned petitioner. With regard to Count II, no evidence of either tape recordings or miniphone conversations was introduced by the People as part of their case in chief [Rep. Tr. p. 848.] Instead, as to Count II, the only use given to a miniphone recording was to prove on cross-examination that petitioner had lied in his direct testimony. (See p. 48 of the Respondent's Brief which was filed with the District Court of Appeal of the State of California and transmitted to this Court.) The use, on cross-examination, of unlawfully obtained evidence to prove the falsity of statements made by defendant on direct examination has been approved of by this Court in *Walder v. United States* (1954), 347 U. S. 62, 98 L. ed. 503, 74 S. Ct. 354. Thus, even assuming that there has been some violations of due process as to Count III in connection with the recording of conversations by miniphone or by mechanical means attached to a telephone, no such evidence was used except on cross-examination with regard to Count III and the conviction on Counts I and II would have to be upheld.

Turning now to the evidence used in support of Count III, namely, the recordings made on the mini-

phone and those made of the telephone conversations, it should be noted that the federal courts have approved the use of such evidence. Thus, the use of an undercover agent who surreptitiously tape records the conversations he engaged in with the suspected criminal has been upheld by this Court in *On Lee v. United States* (1951), 343 U. S. 747, 96 L. ed. 1270, 72 S. Ct. 967. Furthermore, based on this Court's opinion in *Rathbun v. United States* (1957), 355 U. S. 107, 2 L. ed. 2d 134, 78 S. Ct. 161, the lower federal courts have approved the use in evidence of recordations made of telephone conversations when one of the parties to the conversation consents to the recordation. See: *Hall v. United States* (5th Cir., 1962), 308 F. 2d 266, cert. denied, 31 Law Week 3219; *Ferguson v. United States* (10th Cir. 1962), 307 F. 2d 787; and *Carnes v. United States* (5th Cir. 1961), 295 F. 2d 598.

Furthermore, petitioner in this portion of his argument appears to attempt to undermine the entire theory of entrapment since the doctrine of entrapment is based upon the distinction between police officers who, posing as members of the general public, seek to discover crime and police officers who inveigle defendants into committing crimes. The law of entrapment is based upon the theory that police officers are entitled to do the former but not the latter. (See *United States v. Bush* (6th Cir. 1960), 283 F. 2d 51, which distinguishes Fraternal Order of Eagles No. 778; *Johnston, Pa. v. United States* (3rd Cir. 1932), 57 F. 2d 93, the case relied upon by petitioner at page 20 of the petition.) Thus, there cannot be any Constitutional violation of petitioner's rights in the use of police officers to dis-

cover petitioner's criminal activities since as pointed out before in Point I of this argument he was not entrapped.

Conclusion.

Petitioner attempts to create substantial federal questions without any evidence or law to support his contentions. The petition for certiorari should be denied.

Respectfully submitted.

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